IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OTPOINT DIVISION OF GENERAL LECTRIC COMPANY, a New York orporation, Appellant, vs. HARLES D. McCARTY, as rustee in Bankruptcy for HE LUSK CORPORATION, et al, Appellee.	NO. 21812

APPELLANT'S REPLY BRIEF

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RECEIVED AND FILED this_____day of_____,

1968.

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JUDGE, UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

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TABLE OF AUTHORITIES CITED

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HOTPOINT DIVISION OF GENERAL ELECTRIC COMPANY, a New York corporation, Appellant, vs. CHARLES D. McCARTY, as Trustees in Bankruptcy for THE LUSK CORPORATION, et al, Appellee.	NO. 21812

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Heretofore the documents which each party considers appropro to his particular position have been described in the briefs filed with the court. For convenience in considering this brief, again the documents and dates which are considered material to this argument as to major parts thereof are again set forth as follows:

Oct 28, 1965	Petition by creditors against the debtor The Lusk Corporation in B-5696 under Chapter X of the Bankruptcy Act (Tr: 1)
Oct 28, 1965	Order of reference to Referee-Special Master endorsed on bottom of first page of petition of creditors in B-5696 (Tr: 1)
Oct 28, 1965	Temporary Restraining order entered in B-5696 restraining suits, garnishments, sheriffs, etc. issued on petition of creditors in B-5696 (Tr: 17)
Nov 4, 1965	Answer of The Lusk Corporation and subsidiaries for reorganization under Chapter X of the Bankruptcy Act (Tr: 81) B-5720
Nov 5, 1965	Nov 5, 1965 order approving petition Lusk Corporation and subsidiaries B-5720 as complying with provisions of Chapter X of the Bankruptcy Act and as having been filed in good faith. (Tr: 86)
Nov 5, 1965	Order appointing Trustee in B-5720 Lusk Corporation and subsidiaries (Tr: 88)

Nov 17, 1965	Order amending order appointing trustee Lusk Corporation and subsidiaries (B-5720) and fixing time for hearing under 161 of the Bankruptcy Act (U.S.C. 561) (Tr: 93)
Mar 21, 1966	Motion of petitioning creditors to amend original creditors petition B-5696, adding new parties and new claims for Chapter X proceedings (Tr: 42) together with amended petition (Tr: 57)
June 7, 1966	Order allowing amendment to original petition B-5696 (Tr: 66)
Dec 15, 1966	Report and recommendations of referee-special Master on Involuntary petition (B-5696; B-5720) (Tr: 115)
Jan 26, 1967	Order approving petition and appointing trustee B-5696 The Lusk Corporation. (Tr: 69) and setting 161 hearing Mar 23, 1967, and approving involuntary petition as complying with Chapter X of the Bankruptcy Act and as having been filed in good faith
Jan 26, 1967	Order referring B-5696 and B-5720 to Referee-Special Master to hear issues raised by answers filed in B-5696 . (Tr: 159)

As used herein Tr: designates transcript of record filed with the Clerk of the Circuit Court of Appeals and Rt: indiates Reporter's Transcript filed with said Clerk as part of the record on appeal in this case.

In response to Appellee's Proposition of Law No. I, appellant submits that the procedure for taking an appeal is as outlined in Rule 73 of the Rules of Civil Procedure for the United States District Court. Pursuant to those rules in these proceedings the Notice of Appeal (Tr: pages 142 and 143) specifies the orders from which the appeal is taken. As required by the rule the Clerk of the District Court sent copies of the Notice of Appeal to attorneys of record for all interested parties, including Charles D. McCarty as Trustee, the latter being designated as Appellee in the Appellant's Opening Brief filed herein. (See Clerk's Docket pages in B-5720 under entry of 2-23-67 and 2-27-67.) The Notice of Appeal (Tr: 142 and 143) does not designate an appellee. This is not required by Rule 73. The caption on the Notice of Appeal is "In the Matter of The Lusk Corporation, a Delaware corporation, et al, Debtors", the caption of the case in the District Court.

Subsequent to the filing and mailing of the notice of appeal the appellant herein filed a motion with the District Court seeking to limit the papers to be forwarded to the Circuit Court to those which appeared to be essential for the presentation of the questions on appeal. In this connection a designation

of the record sought was filed and a statement of points filed. The motion to limit the contents of the file to be forwarded to the Circuit Court was noticed for hearing and came on for hearing. In connection with the filing of the documents above named copies were served on all counsel of record, namely: the same persons to whom the Clerk of the District Court had mailed copies of the Notice of Appeal. At the hearing of the motion to limit the papers to be forwarded, the only party appearing and taking any part in the proceedings was Charles D. McCarty, the Trustee. (See Clerk's entry 3-2-67, Clerk's Documents No. 329 and 330, and Docket Entry 3-8-67.) Thereafter the Trustee, and no one else, filed a request for additional record on appeal (Tr: 147) and the District Court entered an order limiting the record (Tr: 148, Clerk's Docket 3-9-67 and 3-10-67). By reference the reporter's transcript of proceedings on December 6, 1965, at Pages 1 and 2, it is apparent that the Trustee theretofore appointed in B-5720 intervened in the proceedings in B-5696 (See Clerk's Docket B-5696, 12-6-65 and Document No. 18). From the beginning the record is replete with advocacy by the Trustee on behalf of the petitioning creditors as well as all other creditors except this appellant.

Thus, the only person who has shown any interest in this appeal other than the appellant is the Trustee. (See Motion for Leave to Intervene, Tr: 45; Motion to Approve Involuntary Petition, Tr: 46; Motion to Consolidate, Tr: 48 and 90; and the action of the Referee allowing the Trustee to intervene, Reporter's Transcript page 3, hearing on December 6, 1965.)

The record thus discloses that all attorneys of record were served with the notice of appeal, the designation of record, and the statement of points. As shown by the files in this appellate court, the appellant's opening brief was served on the attorneys; for the petitioning creditors, on the attorneys for the Trustee and on the Trustee.

Except for the Trustee and his attorneys of record, none of the persons upon whom notice of appeal was served nor any of those upon whom any of the other pleadings were served has deigned to come into the appeal proceedings at all. On page 10 of his brief the Trustee, appellee here, notes "The Trustee is not authorized by law to file an answer." It is submitted that probably the trustee is not authorized by law to take part in this appeal. Sections 47, 167 and 186 of the Bankruptcy Act set forth the powers and duties of the Trustee and taken in the

broadest of interpretations there is nothing there about defending or prosecuting a petition by creditors under Chapter X of the Bankruptcy Act, particularly, where if he is right, the Trustee may be defeating his very existence. But since the Trustee was allowed to intervene in the involuntary proceedings and no appeal from that order has been taken, the appellant probably cannot in good conscience state that there has been a complete default or failure to appear by any appellee, although there may be no authority for such action by the Trustee. It is submitted, however, that by reason of the state of the record as above pointed out, appellee's Proposition of Law No. I is untenable and should be rejected by the Court.

As to Proposition of Law No. II urged by appellee on Page 10 of his brief, he does not correctly state the appellant's position. While the appellant does contend that the involuntary petition must be dismissed, the appellant also contends that all of the issues raised by the involuntary petition and the answers thereto became moot upon the filing of the voluntary petition. There is no contention made that the proceedings in B-5720 concerning the voluntary

petition were improper. The contention is that by reason of the fact that before any order was made under Section 142 approving the involuntary petition as complying with Chapter X and as being filed in good faith in B-5696, a voluntary petition was filed in B-5720 by the debtor named in B-5696 and by several of the subsidiaries of the debtor praying for relief under Chapter X. This voluntary petition in B-5720 was filed November 4, 1965, at 4:30 p.m. (Tr: 81). On November 5, 1965, said petition was approved by the District Judge under Section 141 as complying with the provisions of Chapter X of the Bankruptcy Act and as having been filed in good faith (Tr: 86). The business and affairs of the debtor and its subsidiaries have been administered by the court through its trustee then appointed and succeeding trustees (Tr: 88 and 93). Those proceedings in B-5720 rendered the proceedings in B-5696 moot and became a final order subject only to modification should the petition be challenged by creditors before the time fixed for a 161 hearing and after a hearing held under Section 144 of the Bankruptcy Act (11 U.S.C. 544). Contemporaneously, the debtor named in B-5696, The Lusk Corporation, filed its answer admitting all

material allegations of the petition and required to be stated by a debtor seeking relief under Chapter X of the Bankruptcy Act pursuant to the provisions of Section 130 thereof (11 U.S.C. 530) (Tr: 19).

It is well established rule that where proceedings are or become moot the Court will not continue the litigation. This point is covered by appellant in its opening brief, but it seems not amiss to call to the attention of the Court that this is the practice generally in the Supreme Court of the United States. Montgomery Ward & Co., Inc., et al, v. U.S., 326 U.S. 690. From the time of the approval under Section 141 of the voluntary petition of the debtor in B-5720 on November 5, 1965, (Tr: 86) all proceedings in the involuntary proceeding on the petition filed in B-5696 became moot, for all relief that could have been obtained, had then been granted to all creditors in the proceedings in B-5720.

Nor can the "without prejudice" contentions of the Trustee have any bearing on the matter now before the Court. Here we are dealing with the continuation by the Court of a proceeding to determine issues none of which can have any meaning or bearing on the proceedings, and all of which have become moot as a

result of the operation of law upon the acts of the parties and the Court. When the issues became moot no one could be prejudiced; nor can any action by the parties by stipulation or agreement change the legal effect of what was in fact done.

The appellee was not prejudiced at the time the voluntary petition filed in B-5720 was approved by the District Judge under Section 141 of the Bankruptcy Act (11 U.S.C. 541) pursuant to which a Trustee was appointed. Without that approval he could not have been appointed a Trustee at all. (Sec. 112, 113, 114 and 115 of the Bankruptcy Act.) (11 U.S.C. 512, 513, 514 and 515.) In the case in which the voluntary petition was filed B-5720, the business and affairs of the debtor have been administered by the Court through its Trustee ever since. It is submitted at the time the District Judge made his election and approved the voluntary petition of the Lusk Corporation and several of its subsidiaries, the petitioning creditors in the involuntary proceedings, and at any time thereafter were free to go before the District Judge and seek approval under Section 142 of the Bankruptcy Act (11 U.S.C. 542), or if that was denied, to appeal the order of the District Judge

if they thought he was wrong in approving the voluntary petition. The way the pleadings were then framed that would have been an appropriate act; the answer filed by the debtor named in the involuntary petition admitted all material allegations required for such an approval. The Petitioner not only did nothing constructive along that line, but later they amended their petition to add new parties and new claims, which under Rule 15 of the Rules of Civil Procedure creates a new cause of action and does not relate back to the filing of the original petition but is considered as having been filed as of the date of the amendment. (Tr: 42, 57 and 66.)

The Report of the Referee - Special Master confirmed by the Court on January 23, 1967 (Tr: 149) establishes that the issues between the debtor and the petitioning creditors were made moot by the answer of the debtor. To quote from the Report of the Special Master in the transcript at Pages 122 and 123:

"14. The involuntary petition initiated by Morgan's Inc., Construction Materials Co., Inc., and Tucson Blueprint Co., Inc. against Lusk was filed in good faith.

"15. In its answer to the involuntary petition Lusk alleged that it could not continue in the operation of its business unless reorganized under Chapter X of the Bankruptcy Act and admitted its inability to pay its debts as they mature."

And Conclusions of Law appearing on Page 123 state as follows:

"IV As between Lusk and the petitioning creditors, the involuntary petition may be approved under Section 142 (11 U.S.C. 542) without proof of the alleged act of bankruptcy contained therein.

"V Lusk's admission of its inability to continue in the operation of its business unless reorganized under Chapter X of the Bankruptcy Act, coupled with the failure of Lusk to appear at the hearing on December 5, 1965, constitutes a consent on its part to the approval of the creditors' petition."

With respect to Propositions of Law Nos. III and IV of the appellee, it appears to the appellant that all that need to be said is that Section 24 of the Bankruptcy Act permits this appeal. The order under Section 142 in B-5696 from which this appeal is taken is certainly a controversy arising in proceedings in Bankruptcy. The order from which this appeal is taken has far reaching effects on the position of the

parties in B-5720 and calls for much useless procedure over an issue which is moot in B-5696 both by reason of the pleadings in that case and by reason of the proceedings in B-5720.

It is respectfully submitted that the Court should hold that the proceedings became moot with the filing and approval of the petition in B-5720 and if not, they certainly became moot with the filing of the answer of the debtor in B-5696, and there was no issue remaining in B-5696 to be heard. The order of the District Judge requiring the Referee in Bankruptcy sitting as a Special Master to conduct hearings to try some issue which can have no bearing in these proceedings should be reversed and set aside.

It now becomes important to consider the orders entered by the District Judge following a report of the Referee - Special Master, which came before the Court on the 23rd day of January, 1967. It is from this order from which this appeal is taken. The minutes of January 23, 1967 (Tr: 149-150 on Page 150) show that the Court directed that the Referee acting as Special Master ". . .shall with all feasible dispatch, set down for hearing and hear: The Motion of Hotpoint Division of General Electric Company for Dismissal of the Involuntary Petition in B-5696;

the issues raised by the answers of Hotpoint Division of General Electric Company to involuntary petition; the issues raised by the answers heretofore or hereafter properly filed by any person excepting the debtors to the involuntary petition in B-5696 and B-5720 respectively."

It must now be pointed out that long before that, the time for any creditor to file any answer or other pleading in B-5720 had been closed by the effect of the order entered by the Court in B-5720 on November 17, 1965, fixing the 161 hearing in that case as of January 4, 1966. (Tr: 92 and 98.) Pursuant to that order of November 17, 1965 one answer had been filed by First Federal Savings and Loan. (Document 28, Clerk's Docket B-5720, January 3, 1966.) No other person or corporation filed any answer or other pleading attacking the voluntary petition filed by the Lusk Corporation and its subsidiaries in B-5720. Had the petitioning creditors any complaint against this voluntary petition this is when and where they should have filed any attack upon those proceedings.

Now to go back to the order of January 23, 1967. Notwithstanding the record before him, the Judge found

that the involuntary petition filed against the Lusk Corporation only in B-5696 complied with the requirements of Chapter X of the Bankruptcy Act, and that said petition had been filed in good faith; and then directed that the involuntary petition be approved under Section 142 (11 U.S.C. 542); that the involuntary petition be consolidated with the pending proceedings in B-5720 and again fixed a 161 hearing to be held on the 23rd day of March, 1967, and directed that notice thereof be given and the form of such notice (Tr: 69 and 79). This order directed that the notice be given in both cases, B-5696 and B-5720. In this same order the Court approved and adopted the findings of fact and conclusions of law of the Special Master which are set forth in the transcript of record commencing on Page 115. The Court, by this approval, adopted the conclusions of law of the Special Master set forth on Page 123 of the transcript. Particular attention is directed to Conclusions of Law Nos. II, III, IV, XIV and XV. These conclusions of law were confirmed by the Judge so they may be said to be the Conclusions of Law from which the appellant appeals.

The Lusk Corporation and its subsidiaries having sought and obtained Chapter X relief in B-5720 and The Lusk Corporation having consented to the creditors petition in the involuntary proceedings, it is the position of this appellant that there are no further issues to be heard and that collateral issues between petitioning creditors and other creditors are moot and that it is improper and beyond the jurisdiction of the Court to insist that these issues be heard and tried in B-5696 since the time to raise any issues was already foreclosed in B-5720 by the order fixing the 161 hearing in that proceeding. It is therefore beyond the jurisdiction of that Court to insist that all creditors be given another chance to file answers in the involuntary proceedings and in the voluntary proceedings all over again and that any issues raised in either proceeding be heard by the Referee - Special Master in connection with the final approval under Section 144 of the Bankruptcy Act. Likewise, it is even more pointless to insist that the answers filed in B-5696 be now tried before the Referee-Special Master for that proceeding involves only one of the debtors named in B-5720 and can avail no one anything.

That the Judge considered the two proceedings to be separate must be apparent by reason of the difference in the way he handled them. In B-5696 he did no more than issue a restraining Order (Tr: 17). This is the limit of his power pursuant to Sections 112 and 113 of the Bankruptcy Act until the approval of the petition. In case B-5720 he appointed a Trustee and issued a restraining order pursuant to Sections 112, 113, 114, 115, 116 and 119 (11 U.S.C. 512, 513, 514, 515, 516, and 519) of the Bankruptcy Act, and fixed a time for hearing under Section 161 of the Act. (Tr: 88 and 93) He also recognized the difference when he entered his order of consolidation (Tr: 69). There he did not just approve the petition as properly filed in B-5696 and consolidate those proceedings with B-5720; on the contrary he related everything back to the filing of the petition in B-5696 (Tr: 70 and 71), an obvious attempt to cure any failure of jurisdiction should Section 126 of the Bankruptcy Act (11 U.S.C. 526) be held to be jurisdictional and not permissive only. The creditors petitioning in B-5696 also recognized the difference in the two proceedings. They asked for no more than a restraining order against suits, etc. in that proceeding. (Tr: 13) They did not ask for

a trustee nor any of the relief that was granted in B-5720. In fact when it came to the issue of certificates of indebtedness, they were issued under B-5720. (See Clerk's Docket B-5720, Documents 176, 177 and 204; Appendix E), the proceeding in which the Judge had approved the petition, by Lusk Corporation and its subsidiaries, (Tr: 86) pursuant to Section 141 (11 U.S.C. 541) as authorized by Section 119 (11 U.S.C. 519).

The contention in appellee's Proposition of Law No. V that the order from which this appeal is taken is the approval required by Section 141 of the Bankruptcy Act is in error. The order entered under Section 141 of the Act was entered in B-5720 and has not been attacked by any party. The order from which this appeal is taken is the order which was entered by the Court after the report of the Referee - Special Master on the involuntary petition. This order was entered under Section 142 (11 U.S.C. 542); it was not entered until a year after the proceedings in B-5720 and the entry of the order under Section 141. The only parties who had appeared in B-5696, the involuntary petition, up to the time of the entry of the order in said B-5720 under Section 141, approving

the petition as properly filed, were the debtor (that is the Lusk Corporation only) and the three petitioning creditors. In the involuntary petition these petitioners filed an answer on November 5, 1965, the day of the entry of the order in B-5720 approving the voluntary petition (Tr: 26).

As heretofore stated it is the contention of the appellant that the proceedings in B-5720 are a complete defeat of the proceedings in B-5696. Appellant will now advert to specification of Error No. 1 (d), (e) and (f), and Proposition of Law III. An attempt to further delineate its position is in order since from the appellee's brief it appears that he failed to comprehend fully the position of appellant. The attention of the Court is again directed to the record in B-5720 and to the order of the Court in these proceedings on November 17, 1965, fixing the time for a hearing under Section 161 of the Bankruptcy Act (Tr: 93-101). The date of this hearing was fixed for January 4, 1966. No answer contesting the allegations of the debtor's petition in B-5720 was filed by any creditor with the exception of a vague and indefinite answer filed on January 3, 1966, by First Federal Savings & Loan Association. In

connection with this answer, First Federal Savings & Loan Association succeeded in getting all of its interest and demands satisfied on a compromise agreement with the Trustee, which agreement is reflected in Documents 66 and 83, filed with the Clerk of the Court on February 18, 1966, and on March 10, 1966. Copies of these documents are attached to this brief as Appendixes A and B. They are in the record by reason of being in the files of the Clerk, but have not been included in the Abstract, and of course, are available to the Court pursuant to Rule 75(h) of the Rules of Civil Procedure if the Court cares to examine them. The answer of First Federal is included in the abstract and appears at Page 106 of the transcript of the record. Of course, after January 4, 1966, at the conclusion of the 161 hearing, it then became the duty of the Court to set for hearing any answer which had then been filed. Section 144 of the Bankruptcy Act.

Within a reasonable time after the 161 hearing, the disputes between the First Federal, Lusk and the Trustee apparently had become resolved so that there were no answers or proceedings of any kind to be taken under Section 144 (Appendixes A and B). The

Court had already entered an order under Section 141 and the condition precedent to an order under Section 144, to wit: An answer controverting material allegations of the petition and hearing thereon, had not occurred or been resolved, so no further order was necessary under the Bankruptcy Act. Hence, the talk by the appellee about Section 145 has no bearing on the question now before the Court. The conduct of the Court in B-5720 subsequent to the 161 hearing on January 4, 1966, and the record of the proceedings as reflected in the Docket pages of B-5720 will bear out this interpretation of the record as it exists.

From the foregoing, it thus appears that since the appointment of the Trustee in B-5720 and the approval of the petition under Section 141 in B-5720 there has been no purpose whatsoever of the proceedings in B-5696 because all of the proceedings in that case, which is the case where the petition was filed by the petitioning creditors against the Lusk Corporation only, are entirely useless and can afford no relief to anyone, least of all to the petitioning creditors who filed the proceedings.

Because the Court may consider the suggestion of the appellee that Section 126 (11 U.S.C. 526) is jurisdictional it is necessary to discuss that Section at this time. It is submitted that Section 126 (11 U.S.C. 526) must be read in connection with Sections 127 and 128. Sections 127 and 128 (11 U.S.C. 527-528) determine the venue for filing any petition under Chapter X. This meaning is fortified by Section 236 (11 U.S.C. 636) of the Bankruptcy Act. With this latter Section in mind, Section 126 (11 U.S.C. 526) can have but one meaning; that is 126 (11 U.S.C. 526) confers the right upon either a corporation or three creditors to file a petition for Chapter X relief. Here we have petitioning creditors on one hand and a debtor and its subsidiaries on the other hand having filed separate Chapter X petitions in the same Court; no question of the venue therefore between the two petitioners can exist. Had any action been taken by the petitioning creditors to challenge the voluntary petition by reason of the priority of the involuntary petition, the Judge would have found it necessary to decide the meaning of Section 126 (11 U.S.C. 526) and its effect. The Judge was advised and had knowledge of both petitions, as well as the answer filed in B-5696.

On Page 11 of his brief the appellee tells of the chaos which will follow should the Court sustain the position of the appellant. It is quite the other way. The dismissal of the involuntary petition is the only way in which these proceedings may be allowed to continue in an orderly manner. The position of the appellee to the effect that issues raised by any creditor or debtor by a pleading directed to the involuntary petition in B-5696 must be disposed of under Section 144 (11 U.S.C. 544) before the proceedings in B-5720 can be operative, and that upon such disposition under Section 144 the proceedings must be undertaken anew (although such disposition be of an immaterial issue as distinguished from a material issue) will create chaos indeed. His position that neither a creditor or a trustee could be a party to an appeal from an order under Section 144, could only be true were no creditor or trustee to file an answer or other appropriate pleading under Section 137 prior to a 161 hearing. The second approval under Section 144 is only required if an answer raising an issue under Section 137 is tried. For more than two years the affairs of the Lusk Corporation and several of its subsidiaries have been managed under the operation of a trustee in B-5720 appointed after the

approval of the voluntary petition pursuant to Section 141; its assets have been consumed by attrition of interest and taxes to a great extent. Some of its assets have been sold and some abandoned. The Trustee's bond certainly would be in jeopardy. Of course, this might be the best that could happen to the creditors! Actually, since the petitioning creditors in B-5696 have done nothing since the filing of this petition; have never filed or suggested a plan and by depositions taken long before the order from which this appeal is taken, excerpts of which are quoted and inserted in Appendixes C and D hereof, never had a plan. The petition should be dismissed under Section 236 (11 U.S.C. 636).

With the filing of the involuntary petition in B-5696 the Judge then had power over the assets of the corporation and as stated in the Act could exercise all powers of a bankruptcy court in a proceeding prior to an adjudication as well as issue restraining orders, injunctions, etc. Sections 112 and 113 of the Bankruptcy Act. No affirmative action was taken by the Court or the petitioning creditors, in the involuntary proceedings to grant or obtain any such relief. When the voluntary petition in

B-5720, filed by the debtor named in B-5696, and several of its subsidiaries, came before the Judge, he not only approved the petition under Section 141 but a few days later entered a supplemental order granting the relief authorized by Sections 114 and 115 of the Bankruptcy Act only upon or after the approval of a petition. (Tr: 86, 88, 89 and 93.) These were appealable orders. None of the parties to the involuntary proceedings sought to take any of the steps to effect an appeal from said orders and the time therefore now has long since lapsed. c.f. In re Hudson and Manhattan Railroad Company, 138 F. Supp. 195 and In the Matter of Hudson & Manhattan Railroad Company, Debtor, in Proceedings for Reorganization pursuant to Chapter X of the Bankruptcy Act., Hudson & Manhattan Railroad Company, Debtor, Appellant, v. Herman T. Stichman, Trustee of the Debtor, et al., Appellee, and William J. Harding, Jr., et al., No. 173, Docket 23732, United States Court of Appeals, Second Circuit, 229 F.2d 616. At that time in the involuntary proceedings, the debtor had admitted all of the allegations required by Section 130 of the Bankruptcy Act and necessary to permit the Judge to approve the petition in B-5696 under Section 142 of the Bankruptcy Act, and

to then exercise the power conferred upon him by Sections 114 and 115 of the Bankruptcy Act. Instead he acted on the voluntary petition of the debtor and its subsidiaries. That act was an appealable order if he had improperly construed, read or interpreted Section 126 (11 U.S.C. 526), or through inadvertence had completely overlooked it.

As stated in Duggan v. Sansberry, 327 U.S. 499:

> "This problem involves, of course, not the ordinary power of one court of general jurisdiction to question the jurisdiction of another court of general jurisdiction."

Here we have but one court and but one judge acting in both proceedings. Whether one petition or the other petition seeking relief under Chapter X was filed correctly or erroneously, all of the interested parties had an opportunity to come into the proceedings, and those who started the involuntary petition could have challenged the voluntary proceedings by a direct application to the Judge; instead, the voluntary proceedings were permitted to continue over a long course of time and many things were done therein, while the involuntary proceedings in B-5696 remained dormant. No one has ever taken any action to challenge the act of the District Judge in approving the voluntary petition filed in B-5720

under Section 141 of the Bankruptcy Act (11 U.S.C. 541). The time for that to be done under Section 137 of the Bankruptcy Act (11 U.S.C. 537) was fixed as of January 4, 1966, the date set by the District Judge for the hearing required by Section 161 of the Bankruptcy Act (11 U.S.C. 561), or if any of the interested parties so desired, an appeal from the order under Section 141 could have been taken pursuant to Section 24 of the Bankruptcy Act within the statutory period after it was entered. The voluntary proceedings in B-5696 should have been considered as being abandoned. 1 Am Jur 2d Abatement Survival & Revival, Section 9, Page 47; 1 Am Jur Abatement, Section 14, Page 52. As pointed out in 1 C.J.S. 17, Abatement and Revival, page 52, a party may waive the abatement of the second suit if sufficient grounds are shown to base an estoppal. Here the petitioning creditors in B-5696 have taken no steps whatsoever to change the course of the Judge in B-5720. No appeal was taken and it is submitted this Court should reverse the order from which this appeal is taken and should hold that the involuntary proceedings were abandoned as well as moot and that no further action should be taken by the District

Court or the District Judge in B-5696-Tuc. except to dismiss that proceeding.

Respectfully submitted this 29 day of January, 1968.

LESHER, SCRUGGS, RUCKER, KIMBLE & LINDAMOOD

By _____

Attorneys for Appellant
3773 East Broadway
Tucson, Arizona

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

F I L E D
FEB 18 1966 3:30 p.m.
WM. B. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By Mae W. Turner
Deputy Clerk

In the Matter of THE LUSK CORPORATION, et al., Debtors.	In Proceedings for the Reorganization of Corporations Pursuant to Chapter X No. B-5720-Tuc.

PETITION FOR AUTHORITY TO SELL PROPERTY, TO COMPROMISE CLAIMS, AND TO EMPLOY ATTORNEYS FOR SPECIFIED PURPOSES

The petition of A. C. SIMON respectfully represents:

1. Petitioner is the duly appointed, qualified and acting Trustee of the above-named debtors.

2. At the time of the appointment of your petitioner, the Lusk Corporation was the owner of the following described real property consisting of building lots with improvements thereon in Maricopa County, Arizona:

Lots 2, 4, and 44 in Country Gables according to Book 91 of Maps, Page 42, records of Maricopa County, Arizona

Said corporation was also the owner of second mortgages on the following described improved lots in said Country Gables:

> Lots 8, 41, 48, 96, 122, 146, 151, 156, 157, 159, 181, 182, 194, 224, 230, 248, 253, 292, 302, 324, and 320 in said subdivision.

3. Each of the second mortgages described in paragraph 2, was executed and delivered to the Lusk Corporation as security for purchase money notes executed and delivered to said Corporation by Donald G. Millett and wife.

4. Each of the lots described in paragraph 2 was, at the time of the appointment of your petitioner, and now is, subject to a first mortgage to First Federal Savings and Loan Association of Phoenix.

Each of the said first mortgages was and is delinquent; real property taxes upon all of the properties are delinquent, and many of the properties are deteriorating in value.

5. Prior to the appointment of your petitioner, because of delinquencies in the payments on the second mortgages above-described, suits were filed in Maricopa County, Arizona, to foreclose 19 of the said second mortgages. Said suits are now pending in Maricopa County, Arizona. In connection with

said foreclosure actions, and in connection with the settlement of claims arising pursuant to the second mortgages which were not the subject of foreclosure, the Lusk Corporation, prior to the appointment of your petitioner, had employed the Phoenix law firm of Kramer, Roche, Burch, Streik and Cracchiolo to file the said foreclosure actions and to represent the said corporation in connection with the second mortgages.

6. The actual value of the said second mortgages has decreased and will continue to decrease because of the following factors:

a. A general deterioration in the real estate market in the area.

b. A weathering and deterioration of the properties themselves.

c. Unpaid interest accruals.

d. Unpaid delinquent taxes which continue to accrue.

7. Petitioner has reviewed all of the properties in an attempt to determine the present cash value of petitioner's interest in the said properties. From the information available to your petitioner, petitioner alleges that with respect to some of the said properties, the value of your petitioner's

interest has been destroyed by a combination of the circumstances above-enumerated, and that as to the remaining properties, the continued accrual of taxes and interest on the first mortgages are destroying the equity of petitioner. The cost of managing the properties is such that petitioner alleges that it is economically inadvisable for him to attempt to manage the said properties.

8. Petitioner has caused an investigation to be made of the financial position of the said Donald G. Millett and upon the base of said investigation, petitioner alleges that the financial position of the said Donald G. Millett is such that any substantial deficiency judgment against him would prove to be noncollectable.

9. A proposal has been made to your petitioner that he settle and compromise his position as to all of said properties upon the following basis:

a. First Federal Savings and Loan Association has offered to your petitioner the sum of $3,000.00 in cash in payment for all of petitioner's interest in and to the said properties. Said offer is conditioned upon the employment by your petitioner of attorneys to procure the effective extinquishment

of any interest of the said Donald G. Millett and wife in any of said properties. Said First Federal Savings and Loan Association has further agreed to permit your petitioner to make any arrangement acceptable to petitioner with the said Donald G. Millett as to any deficiency, and to be bound by any such arrangement.

b. The said Donald G. Millett and wife have offered to your petitioner, in settlement of the claims of your petitioner, for deficiency judgments as to the second mortgages, the sum of $1,300.00 cash, a promissory note payable on or before five years from date, executed by the said Donald G. Millett and wife, in the principal sum of $6,700.00 bearing interest at the rate of 6% per annum, and the conveyance to petitioner of the following described property in Maricopa County, Arizona:

> Lots 39, 68, 69, 72, and 73 in Poinsettia No. 2, Maricopa County, Arizona, according to the Document of record in the office of the County Recorder of Maricopa County in Docket 5091 at page 455.

which said property your petitioner is informed and believes it is worth approximately eight to ten thousand dollars at present market value.

c. The said firm of Kramer, Roche, Burch, Streik and Cracchiolo, by virtue of legal services performed in connection with said foreclosures, prior to the appointment of your petitioner, claims a lien upon any proceeds from said foreclosures, either by judgment or by compromise. Said firm has agreed to represent your petitioner in bringing about the effective extinguishment of the claim of the said Donald G. Millett and wife to the said properties, and to accept from petitioner in full settlement of any claim for services antedating the appointment of your petitioner and services performed by your petitioner, the sum of $1,000.00.

d. First Federal Savings and Loan Association has agreed to pay to said law firm of Kramer, Roche, Burch, Streik and Cracchiolo, any amount in excess of $1,000.00, claimed by said law firm on account of services performed in connection with the Millett mortgages, either before or after the date of the appointment of your petitioner.

10. Unnecessary expense would be entailed for this estate if other counsel is retained to represent petitioner in connection with the foreclosure of the Millett mortgages.

11. Your petitioner wishes to employ the said law firm of Kramer, Roche, Burch, Streik and Cracchiolo, for the specified purposes of representing him in connection with the Millett mortgages, and to bring about the extinguishment of the claims of the said Donald G. Millett and wife in and to any of said properties, by foreclosure judgment, or by compromise. Professional services to be rendered are the representation of your petitioner, the negotiation with the said Donald G. Millett and wife, the preparation of such documents as may be required in the event of a compromise, or the taking the foreclosure actions to final judgments in the event no compromise is possible.

12. The said law firm represents no interest adverse to the Trustee or this estate in the matters upon which it is to be engaged and the employment of said firm would be to the best interests of this estate.

WHEREFORE YOUR PETITIONER PRAYS:

1. That this Court approve and authorize the sale of the above-described properties for the above-enumerated considerations.

2. That this Court authorize the compromise of the above-enumerated claims upon the above-described basis.

3. That this Court approve the employment of the firm of Kramer, Roche, Burch, Streik and Cracchiolo for the specified purpose of representing your petitioner as Trustee in connection with the Millett mortgages as above-described for the flat fee of $1,000.00, said fee to be in full payment of any claim of said firm as against your Trustee or as against the estate of the above-named debtor or in connection with all services rendered whether before or after the date of the appointment of your receiver and in full discharge of any claim of lien.

4. That your petitioner has such other and further relief as is just.

A. C. Simon
A. C. Simon, Trustee

Charles D. McCarty
Charles D. McCarty
304 So. Arizona Bank Bldg.
150 North Stone
Tucson, Arizona
Attorney for Trustee

STATE OF ARIZONA)
) ss.:
COUNTY OF PIMA)

I, A. C. SIMON, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

A. C. Simon
A. C. Simon

Subscribed and sworn to before me this 18th day of February, 1966.

Celia D. Garcia
Notary Public

My Commission expires:

7-4-68 (Seal)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

F I L E D
MAR 10 1966 3:10 p.m.
WM. D. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By Mae W. Turner
Deputy Clerk

In the Matter of THE LUSK CORPORATION, et al., Debtors.	In Proceedings for the Reorganization of Corporations Pursuant to Chapter X No. B-5720-Tuc.

REPORT OF SPECIAL MATER ON TRUSTEE'S PETITION TO SELL PROPERTY, TO COMPROMISE CLAIMS AND TO EMPLOY ATTORNEYS FOR SPECIFIED PURPOSES.

The above matter came on for hearing before the undersigned, sitting as Special Master on Thursday, March 3, 1966, at the hour of 10:00 a.m. Due notice of hearing was given in accordance with the order of the Court. The Trustee was in attendance in person and by his attorney. Evidence was adduced in support of the allegations of the petition, and now the undersigned having heard and considered all of the evidence and being fully advised in the premises, reports to the Court his finding that the allegations

contained in Trustee's petition are true and that the best interests of the estate of the above-named debtor require that Trustee be granted the relief prayed for in the form of order attached to this report.

DATED THIS 10 day of March, 1966.

Hugh M. Caldwell
Referee in Bankruptcy,
Sitting as Special Master

(Title of the foregoing Court and Cause No. B-5720-Tuc.)

ORDER AUTHORIZING TRUSTEE TO SELL PROPERTY, TO COMPROMISE CLAIMS AND TO EMPLOY ATTORNEYS FOR SPECIFIED PURPOSES

The Honorable Hugh M. Caldwell, Referee in Bankruptcy, sitting as Special Master, having submitted to the Court his report on the petition of the Trustee for authority to sell property, to compromise claims and to employ attorneys for specified purposes, and the Court having considered said report and now finding that the best interests of the estate of the above-named debtor, require that the said petition be granted and that the Trustee be given the authority therein requested, it is therefore

ORDERED:

1. That Trustee be, and he is hereby, authorized to sell to First Federal Savings and Loan Association of Phoenix, Lots 2, 4 and 44 in Country Gables according to Book 91 of Maps, Page 42, records of Maricopa County, Arizona, together with second mortgages on the following described Lots in said Country Gables:

> Lots 8, 41, 48, 96, 122, 146, 151, 156, 157, 159, 181, 182, 194, 224, 230, 248, 253, 292, 302, 324, and 320 in said subdivision,

for the sum of THREE THOUSAND AND NO/100 ($3,000.00) DOLLARS cash.

2. That Trustee be, and he is hereby, authorized to compromise any and all claims which he as Trustee has against Donald G. Millet and Wife, because of alleged deficiencies on the second mortgages described in paragraph 1. above, for the sum of ONE THOUSAND THREE HUNDRED AND NO/100 ($1,300.00) DOLLARS cash, a promissory note payable on or before five years from date, executed by the said Donald G. Millet and wife, in the principal sum of SIX THOUSAND SEVEN HUNDRED AND NO/100 ($6,700.00) bearing interest at the rate of SIX (6%) per cent per annum, payable to Trustee, and the conveyance to Trustee by the said Donald G. Millet and wife of the following

described property in Maricopa County, Arizona:

> Lots 39, 68, 69, 72, and 73 in Poinsettia No. 2, Maricopa County, Arizona, according to the Document of record in the office of the County Recorder of Maricopa County in Docket 5091 at page 455.

said property to be conveyed to Trustee free and clear of encumbrance.

3. The sale authorized in paragraph 1. above is not conditioned upon the consummation of the compromise set forth in paragraph 2. of this order, and in the event that the compromise described in paragraph 2. of this order is not consummated, said failure of consummation shall in no wise affect the authorization of sale envisioned in paragraph 1 hereof, it being understood that in the event of such failure of consummation, Trustee will proceed with his legal remedies against the said Donald G. Millet and wife.

4. That Trustee be, and he is hereby, authorized to employ the firm of Kramer, Roche, Burch, Streik and Cracchiolo for the purpose of representing Trustee in connection with the foreclosure suits now pending against Donald G. Millet and wife, the attempted consummation of the compromise above-described, and the extinguishment of any claim of

the said Donald G. Millet and wife to any of the above described property. For such services Trustee is authorized to pay to such firm the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS, said payment to be in full discharge of the liability of Trustee and of The Lusk Corporation for services performed by said firm, whether performed before or after the date of appointment of Trustee, in connection with the claims against Donald G. Millet and wife, said sum to be further in full discharge of any claim of lien which the said firm has because of any services antedating the appointment of Trustee.

DATED THIS 10 day of March, 1966.

James A. Walsh
DISTRICT JUDGE

APPENDIX C

Excerpt from the deposition of Wilbert Anderson, taken in Tucson, Arizona, November 30, 1965, In the Matter of Lusk Corporation Debtor in B-5696-Tuc:

Page 11, Line 19

Q Now, in your petition under Chapter 10 of the Bankruptcy Act, I believe you signed as president of Tucson Blueprint Company, Inc.

A That is true.

Q That petition was filed against the Lusk Corporation, debtor, is that correct?

A Is that who it was filed for?

MR. HARRIS: Yes.

Page 16, Line 11

Q In the first sentence of that paragraph you said petitioners desire that a plan for the reorganization of the sake corporation be effected.

What did you mean by that sentence?

MR. ROTHSCHILD: Same objection. My objection runs to this total line of questioning as to what Mr. Anderson individually meant.

MR. SCRUGGS: As far as I am concerned you may --

MR. HARRIS: I would also join the objection.

THE WITNESS: Do I answer it?

MR. HARRIS: Yes, go ahead and answer. This is just a deposition.

THE WITNESS: I personally felt that the reorganization would give us a chance to recover.

Q (By Mr. Scruggs) What did you mean by a reorganization? Maybe I should put the question to you another way. What plan of reorganization did you have in mind?

A I truthfully didn't have any. It was in my mind this has happened in the past and these reorganizations have been possible.

Q Had you had any experience with reorgani-· zations of businesses?

A Not directly, no, sir.

APPENDIX D

Excerpt from the deposition of A. Bates Butler, taken in Tucson, Arizona, November 30, 1965, In the Matter of Lusk Corporation, Debtor in B-5696-Tuc:
Page 5, Line 4

Q You did not? Now, you have filed a petition, or rather as a petitioning creditor in Case No. 5696 in the matter of the Lusk Corporation, is that correct?

A That is true.

Q You have a copy of your petition before you at this time?

A I have.

Q What is your relationship to Construction Materials Company, Inc.?

A Trustee in bankruptcy.

Q Is it actually in bankruptcy?

A It is in bankruptcy.

Q Now, in filing this petition you were acting as the trustee in bankruptcy, am I right?

A That is true.

Q And it's actually a petition by you as trustee in bankruptcy for Construction

Materials, Inc., am I correct?

A That is correct.

Page 22, Line 4

Q You made no inquiry?

A I did not. I understand Mr. Lusk has admitted that to be true.

Q Did he admit that to you?

A No, he admitted it in his answer.

Q And you have got the answer before you?

A Well, there is one right here. As a matter of fact, on his affidavit attached to the answer he says that the allegations contained in said petition which he denied in the foregoing answer are true.

MR. McCARTY: Typographical error.

MR. SCRUGGS: Say it again. What petition is he talking about?

THE WITNESS: In that answer which was filed with the petition in B-5696, Tucson, in the bankruptcy court under Chapter 10.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

F I L E D
JUL 8 - 1966 8:43 a.m.
WM. H. LOVELESS, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By Louise Clolland
Deputy Clerk

In the Matter of THE LUSK CORPORATION; et al., Debtors.	No. B-5720-Tucson In Proceedings for the Reorganization of a Corporation, Chapter X.

ORDER AUTHORIZING TRUSTEE TO ISSUE CERTIFICATE OF INDEBTEDNESS

The Special Master having submitted his report on the petition of Charles D. McCarty as trustee for authority to issue a certificate of indebtedness to Arizona Land Title & Trust Company evidencing the indebtedness of trustee to said company for moneys advanced by said company at the request of the trustee to pay administrative expenses; and

NOW, upon consideration of said petition and of said report, the Court finding that the best interests of the estates require that trustee be given the authority prayed for;

IT IS ORDERED, that Charles D. McCarty be, and he is hereby, authorized to issue a certificate of indebtedness in the sum of Eighteen Thousand Eight Hundred Twenty-three and 96/100 ($18,823.96) Dollars, payable on or before one (1) year from the date of said certificate, the said sum and the said certificate to bear interest at the rate of six per cent (6%) per annum, the said interest to be payable on the several sums advanced from the date of the actual advance by the said Arizona Land Title & Trust Company.

DATED this 8 day of July, 1966.

James A. Walsh
UNITED STATES DISTRICT JUDGE

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward W. Scruggs